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In the Supreme Court of the United States

OCTOBER TERM, 1969

WALTER W. MEEK, *Petitioner,*

vs.

STATE OF ARIZONA, *Respondent.*

Petition for a Writ of Certiorari to the Court of Appeals, Division One, State of Arizona

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. .....

WALTER W. MEEK,
Petitioner,

vs.

STATE OF ARIZONA,
Respondent.

Petition for a Writ of Certiorari to the Court of Appeals, Division One, State of Arizona

Petitioner prays that a writ of certiorari issue to review the opinion and judgment of the Court of Appeals, Division One, of the State of Arizona, entered in the above entitled and numbered case on February 4, 1969.

OPINIONS BELOW

The Court of Appeals, Division One, entered an opinion affirming the judgment of the trial court of conviction on September 30, 1968, holding in effect that the Court of

Appeals as an intermediate appellate court had no jurisdiction to review a rule of the Supreme Court of the State of Arizona. A Motion for Rehearing was timely filed, denied, and a Petition for Review was filed with the Supreme Court of the State of Arizona which was first denied and thereafter granted and the cause remanded to the Court of Appeals, Division One, for a consideration and opinion on the merits.

Thereafter and on February 4, 1969, the Court of Appeals, Division One, filed and entered its opinion affirming the judgment of the trial court of guilt and the judgment of conviction of the criminal offense entered thereon.

A Motion for Rehearing was timely filed with the Court of Appeals, was denied and thereafter a Petition for Review was timely filed with the Supreme Court of the State of Arizona, which was denied April 1, 1969.

The opinion of the Court of Appeals, Division One, on the merits is printed Appendix A hereto and reported in ..... Ariz. ....., 450 P.2d 115. The Motion for Rehearing which raised the question as to equal protection of the laws and due process by reason of the refusal of the Court of Appeals, Division One, to consider and pass upon a substantial federal question involving the constitutional rights of petitioner herein was timely filed and is printed herein as Appendix B. The order denying the Motion for Rehearing is printed herein as Appendix C.

The Petition for Review filed by petitioner was timely filed and is printed hereto as Appendix D. The order of the Supreme Court denying the Petition for Review is printed hereto as Exhibit E. The order denying the Motion for Rehearing filed with the Court of Appeals and the order denying the Petition for Review filed with the Supreme Court of the State of Arizona are unreported.

JURISDICTION

The judgment and Opinion of the Court of Appeals, Division One, was rendered and filed February 4, 1969 and a Motion for Rehearing was timely filed with that court February 12, 1969 and said motion was denied by the Court of Appeals February 26, 1969.

A Petition for Review was filed with the Supreme Court of the State of Arizona on the 27th day of February, 1969 and the order of the Supreme Court of the State of Arizona denying review was entered and filed April 1, 1969. The jurisdiction of the Court is invoked under 28 U.S.C., Section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

First, Fifth and Fourteenth Amendments to the Constitution of the United States.

QUESTIONS PRESENTED

Question 1.

Does a state rule of criminal procedure which permits a defendant charged with a criminal offense on a preliminary hearing to arbitrarily and without any showing that a danger to a legitimate state interest which is serious, direct and immediate exists, which rule required the exclusion of a newspaper reporter from attendance at such hearing, contravene the First Amendment to the United States Constitution as constituting a prior restraint upon freedom of the press?

Question 2.

Does the enforced removal of a citizen from a public court room wherein a preliminary hearing is to be held without any showing that a legitimate state interest which is serious, direct and immediate requires such removal and upon the arbitrary demand of a defendant in a criminal prosecu-

tion as authorized by a state rule of criminal procedure deprive such a citizen of liberty and property without due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution?

Question 3.

Does the refusal of an appellate court upon an appeal by a defendant convicted of a criminal offense to consider and rule upon a substantial claim that the conviction impinges upon rights guaranteed to such defendant by the Fifth and Fourteenth Amendments to the Constitution of the United States deny such defendant due process of law and the equal protection of the laws in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States?

STATEMENT OF THE CASE

Danny Lee Eckard was charged by the State of Arizona with a criminal offense of kidnapping, a felony, and his preliminary hearing to determine if there was probable cause to bind Eckard over to the Superior Court for trial was set for hearing before a magistrate. There was considerable public interest in the case since Eckard had escaped from the state prison, committed the offense charged and then managed to elude peace officers for a substantial period of time. The press had given him the romantic title of "The Desert Fox."

The hearing was to be conducted in the court room of a Justice of the Peace in the Maricopa County Court House, a public place. Walter W. Meek was then employed as a reporter by the Arizona Republic, a newspaper of statewide circulation and was directed by his employer to attend and report the proceeding. Meek was also interested as a citizen in the functioning of the Arizona courts and was

interested in learning why Eckard had been able to elude peace officers with apparent ease.

Rule 27 of the Arizona Rules of Criminal Procedure, as then written, permitted a defendant at a preliminary hearing to exclude all persons, other than court personnel, witnesses and counsel from the hearing court room without any showing of good cause for such exclusion or giving any reason therefor.

Meek attended the hearing and seated himself in the spectator area in the court room. When the hearing opened the defendant demanded that all persons be removed from the court room without giving any reason for the demand and the magistrate thereupon in response to such demand, ordered Meek to leave the court room. Meek refused to leave upon the ground that he was entitled as a reporter to attend the hearing and report the proceedings as a newsworthy matter in which the public was interested. He also refused to leave upon the ground that as a citizen he had a right to be and remain in a public place if he so desired and upon the further ground that as a reporter his livelihood depended upon reporting newsworthy matters in which the public was interested. When Meek persisted in his refusal to leave, the Sheriff of Maricopa County was called and he attended upon the hearing with a deputy sheriff and Meek was required to leave the court room against his will and contrary to his desire to remain in this public place.

Thereafter the County Attorney charged Meek with criminal contempt for refusing to obey the order of the magistrate that he leave the court room and he was tried, found guilty and fined $300.

Meek duly appealed to the Arizona Court of Appeals, Division 1, which affirmed the conviction.

Meek timely filed a Motion for Rehearing with the Court of Appeals which denied the motion February 26, 1969. Thereafter Meek timely filed a Petition for Review with the Arizona Supreme Court and that Court denied review April 1, 1969.

HOW FEDERAL QUESTION WAS PRESENTED IN STATE COURT

Meek filed a Motion to Quash the Direct Information (with a supporting Memorandum of Points and Authorities) upon the grounds:

"1. Defendant was (and now is) a citizen of the United States of America and of the State of Arizona.

2. Defendant was (and now is) a taxpayer of the United States, the State of Arizona, the County of Maricopa and the City of Phoenix.

3. Defendant then was (and now is) employed as a reporter by Phoenix Newspapers, Inc., publisher of the Arizona Republic and earns his livelihood by attending, observing and reporting upon activities and occurrences in the County of Maricopa, governmental in character and otherwise, in which the public has an interest and as to which the public has a right to be informed and kept informed and which are therefore a legitimate subject of news stories."

* * * * * * *

"8. Defendant respectfully represents to the Court that Rule 27, Rules of Criminal Procedure, is unconstitutional and void as contravening . . . the Constitution of the United States . . . in particular:

(a) The First Amendment to the Constitution of the United States as abridging the freedom of the press;

(b) The Fifth Amendment to the Constitution of the United States as depriving defendant of liberty and property without due process of law;

(c) The Fourteenth Amendment to the Constitution of the United States in that said Rule abridges the privileges and immunities of defendant as a citizen of the State of Arizona and of the United States; deprives defendant of liberty and property without due process of law; and denies defendant the equal protection of the laws; * * *"

The trial judge denied the motion and Meek then entered a plea of "not guilty."

On appeal Meek presented as Questions for Review:

Whether or not Rule 27, Rules of Criminal Procedure was void, insofar as it authorized and required a magistrate upon demand of the defendant on a preliminary hearing of a criminal complaint to exclude news reporters and all members of the public from said hearing upon the grounds:

(a) It was invalid as repugnant to the Fifth and Fourteenth Amendments to the United States Constitution in that it deprived appellant of liberty and property without due process of law;

(b) It was invalid and repugnant to the First Amendment to the United States Constitution as made applicable to state action by the Fourteenth Amendment to the Constitution of the United States as abridging the freedom of the press and constituting a prior restraint upon the freedom of the press.

The Opinion of the Court of Appeals did not consider or pass upon Meek's claims that his Fifth and Fourteenth Amendment guaranties had been infringed by the order of the magistrate that he leave the court room. Meek therefore, in his Motion for Rehearing, directly asserted that the failure of the Court to pass upon (a) and (b) above denied him due process of law and equal protection of the laws as assured by the Fourteenth Amendment to the

United States Constitution, all in violation of his constitutional rights. The Court of Appeals denied the motion without Opinion.

Arizona does not permit any assignments of error or other argument in a Petition for Review by the Arizona Supreme Court and hence the Petition for Review prayed only for a review. The Court of Appeals forwarded the entire record to the Arizona Supreme Court including the Motion for Rehearing and the Arizona Supreme Court denied review without Opinion.

REASONS FOR GRANTING THE WRIT

As to Question 1.

Arbitrary exclusion of a reporter from attendance at a public hearing involving a matter of public interest absent a danger to a legitimate state interest which is serious, direct and immediate for the purpose of preventing publication of news items based upon such hearing constitutes a prior restraint upon freedom of the press contravening the First Amendment guaranty of freedom of the press.

Grosjean v. American Press Co., 297 U.S. 233, 80 L.ed. 660, 56 S.Ct. 444

A Quantity of Books v. Kansas, 378 U.S. 205, 84 S.Ct. 1723, 12 L.ed.2d 809

Kovash v. Maddux, 238 F.Supp. 835 (1965)

"It is bad because, in the light of its history and of its present setting it is seen to be a deliberate and calculated device *in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guarantees.* A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves. * * *" (Emphasis added) *Grosjean*, supra, 297 U.S. at 250

As to Question 2.

Arbitrary exclusion of a citizen lawfully in attendance at a public place from such place, absent a danger to a legitimate state interest which is serious, direct and immediate requiring such exclusion, contravenes the guaranties of the Fifth and Fourteenth Amendments to the United States Constitution that no person shall be "deprived of * * * liberty or property without due process of law" or denied "the equal protection of the laws."

Brown v. Louisiana, 383 U.S. 131, 15 L.ed.2d 637, 86 S.Ct. 719

Aptheker v. Secretary of State, 378 U.S. 500, 12 L.ed.2d 992, 84 S.Ct. 1659

Kent v. Dulles, 357 U.S. 116, 2 L.ed.2d 1204, 78 S.Ct. 1113

"Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage." (357 U.S. at 126)

Bates v. Little Rock, 361 U.S. 516, 80 S.Ct. 412, 4 L.ed.2d 480

As to Question 3.

Appellant in the state court devoted 20 pages of argument to his "freedom of the press" contentions and 18 pages to his Fifth Amendment and Fourteenth Amendment contentions. Actually petitioner placed a very heavy reliance upon his Fifth and Fourteenth Amendment claims. The state court wholly ignored this substantial federal question in its Opinion. This substantial defense of defendant was, in effect, rejected by the Court of Appeals through the simple device of ignoring the claim that Meek's rights under the Fifth and Fourteenth Amendments had been contravened. This refusal of the state courts to grant review to Meek violated his rights to due process of law as guaranteed by

the Fifth and Fourteenth Amendments to the federal constitution and violated his right to equal protection of the laws as guaranteed by the Fourteenth Amendment to the federal constitution.

Truax v. Corrigan, 257 U.S. 312, 42 S.Ct. 124, 66 L.ed. 254

"Equal protection of the law in its constitutional sense implies that all litigants similarly situated may appeal to the courts for relief under like conditions and without discrimination."

Republic Pictures Corp. v. Keppler, 151 F.2d 543 (C.A. 8, 1945) affirmed: 327 U.S. 757, 90 L.ed. 991 66 S.Ct. 523, rehearing denied 327 U.S. 817, 66 S.Ct. 804, 90 L.ed. 1040

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

MARK WEMER

Attorney for Petitioner
Walter W. Meek

May 29, 1969

(Appendices Follow)

Appendix A

In the Court of Appeals
State of Arizona

Division One

Filed Feb 4—1969
Classie Gantt, Clerk

1 CA-CR 162

The State of Arizona,
Appellee,

vs

Walter W. Meek,
Appellant.

Appeal from the Superior Court of Maricopa County
Cause No. 53083
The Honorable William A. Holohan, Judge

AFFIRMED

Darrell F. Smith, Former Attorney General
Gary K. Nelson, The Attorney General
By William E. Eubank, Chief Assistant Attorney General
Carl Waag, Assistant Attorney General
Attorneys for Appellee

Snell & Wilmer, Phoenix
By Mark Wilmer
Attorneys for Appellant

Donofrio, Chief Judge

Appellant, Mr. Walter W. Meek, at the time in question was a newspaper reporter employed by Phoenix Newspapers, Inc. He attended a preliminary examination involving a criminal complaint against one Danny Lee Eckard. Meek testified that he attended the preliminary hearing for a three-fold purpose. First, he had been requested by his employer to report the proceedings for the newspaper. Second, as a member of the public and a citizen of the United States and Arizona he desired to view the proceedings in the Justice Court. Third, he had been notified that Rule 27 of the Arizona Rules of Criminal Procedure might be invoked and his employer requested him to challenge the validity of the rule by refusing to leave the hearing room.

Eckard was "newsworthy" in that he allegedly escaped from the state prison, and after the commission of the alleged criminal offense of kidnapping he was able to elude peace officers for a very substantial period of time in the desert surrounding Phoenix. The press had followed Eckard's activities with much publicity, giving him the romantic title of "The Desert Fox".

Upon the opening of the preliminary hearing to determine if there was probable cause to bind Eckard over to the Superior Court for trial, Eckard's counsel moved under Rule 27 of the Arizona Rules of Criminal Procedure that all members of the public be excluded from the hearing room. The magistrate granted the motion and ordered that all witnesses and spectators leave the courtroom.

Meek refused to leave the room. The Sheriff of Maricopa County was summoned and he, along with a deputy, escorted Meek from the courtroom. Meek did not resist the expulsion but did refuse to leave unless he was required to do so by the sheriff. Meek testified that he was acting under the direction of his employer in order to make a test case and determine the validity of Rule 27.

A Direct Misdemeanor Information was filed in the Superior Court charging Meek with criminal contempt for refusing to obey the order of the Justice of the Peace. The trial court denied a motion to quash the information, which raised the defense of the constitutionality of Rule 27 of the Arizona Rules of Criminal Procedure. At the conclusion of the trial the court found defendant guilty of criminal contempt and fined him $300.

On appeal this Court by a majority opinion held that, being an intermediate appellate court, we had no jurisdiction to determine the validity of rules promulgated by our State Supreme Court, and decided the matter without reference to the constitutional question. State v. Meek, ... Ariz.App. ....., 445 Pac.2d 463 (1968). The Arizona Supreme Court, on a petition for review, remanded this case to the Court of Appeals, entering the following minute entry order:

> "The following action was taken by the Supreme Court of the State of Arizona on Tuesday, December 3, 1968, in regard to the above-entitled cause:
>
> "'Ordered: Petition for reconsideration of order denying Petition for Review—GRANTED.
>
> "'Further Ordered: Remanded to Court of Appeals with directions to determine case on merits.'"

This indicates to us that the Arizona Supreme Court is in accord with the statements as to this Court's position announced in the dissent of our previous opinion in State v. Meek. We now hold that the Arizona Court of Appeals has the power to determine the validity and constitutionality of the rules promulgated by the Arizona Supreme Court in connection with a case before us.

Appellant contends that the Arizona Supreme Court has already held that a trial court has no power to expel the

public from a preliminary hearing. He cites Phoenix Newspapers, Inc. v. Superior Court, 101 Ariz. 257, 418 Pac.2d 594 (1966). There it was announced:

> "Courts are public institutions. The manner in which justice is administered does not have any private aspects. To permit a hearing held in open court to be kept secret, the order of secrecy being based entirely on defendant's request, would take from the public its right to be informed of a proceeding to which it is an interested party." 101 Ariz. at page 259.

We are unable to agree that Phoenix Newspapers is precedent for the case presently before us because of some very important distinguishing features. Foremost is that the case involved the publication of proceedings for a writ of habeas corpus held in open court. Proceedings of habeas corpus are considered civil in nature. Oswald v. Martin, 70 Ariz. 392, 222 Pac.2d 632 (1950). Although the hearing in Phoenix Newspapers involved the sufficiency of the evidence introduced at a preliminary hearing in a criminal case, it nevertheless was not a preliminary hearing.

The precise question involved in Phoenix Newspapers was the trial court's misuse of its inherent power of contempt that pertains to all superior courts and not, as here, the disobedience of an order of the court based upon a rule of criminal procedure. Here the Justice of the Peace was following a rule promulgated by the Arizona Supreme Court, which had the same effect as legislation promulgated by our State Legislature. Brown v. Haymore, 43 Ariz. 466, 32 Pac.2d 1027 (1934). Had the judge in Phoenix Newspapers been acting as a magistrate conducting a preliminary hearing as he may do under A.R.S. § 1-215(11), as amended, Laws of 1959, Ch. 65, and Rule 19 of the Arizona Rules of Criminal Procedure, Wilson v. Superior Court,

..... Ariz. ....., ... Pac.2d ..... (decided January 3, 1969), we could then see a closer application to the present situation.

We are unable to see in this matter a freedom of speech or a freedom of press situation as was the case in Phoenix Newspapers. In no way did the Justice of the Peace at the preliminary hearing prohibit the press from publishing the news. Freedom of the press or freedom of speech should not be construed to give the news media a constitutionally protected right to gain access to information. United Press Association v. Valente, 308 N.Y. 71, 123 N.E.2d 777 (1954).

We can find no Arizona case which states that the fair administration of criminal justice is subordinate to the right of the press to gather material apprising the public of the workings of justice. On the other hand, we find the United States Supreme Court repeatedly espousing a philosophy contrary to this view. See Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966); Estes v. Texas, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965); Irvin v. Doud, 366 U.S. 717, 81 S.Ct 1639, 6 L.Ed.2d 751 (1961); Marshall v. U.S., 360 U.S. 310, 79 S.Ct. 1171, 3 L.ed.2d 1250 (1959); Rideau v. Louisiana, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963).

We regard the instant case as a case of first impression. At the time of Meek's conviction, Rule 27 read:

> "During the examination of any witness, or when the defendant is making a statement or testifying, the magistrate may and on the request of the defendant shall exclude all other witnesses. He may also cause the witnesses to be kept separate and prevented from communicating with each other until all are examined. *The magistrate shall also, upon the request of the defendant, exclude from the examination every person except the attorneys in the case, and officers of the court.*" (Emphasis supplied)

The crucial question to be considered is, can the Arizona Supreme Court promulgate a rule which will make it mandatory upon a magistrate at a preliminary examination to exclude from the courtroom all persons except attorneys in the case, and officers of the court, upon request of the defendant? It should be said that effective February 1, 1968, the Arizona Supreme Court revised the above rule and took from the defendant this unconditional right by eliminating the portion of the rule hereinabove emphasized. We do not feel that this action by the Arizona Supreme Court subsequent to the activities involved in this case lends any light as to the constitutionality of their prior rule. It should also be mentioned that it has already been decided by a recent Court of Appeals decision that despite the rule change, the magistrate has the inherent discretionary power to exclude the public from a preliminary hearing. Schavey v. Roylston, ... Ariz. App. ....., ... Pac.2d ..... (filed December 17, 1968).

Rule 27, or its equivalent, with its mandatory provisions, has been applied by the legislatures in Arizona since 1901. It was originally stated by the legislature as follows:

> "The magistrate shall also, upon the request of the defendant, exclude from the examination every person except his clerk, the prosecutor and his counsel, the district attorney and his counsel and the officers having the defendant in custody." Arizona Revised Statutes of 1901, Penal Code, Section 767.

This statute was copied from the California Criminal Code which was originally enacted in its mandatory form in 1851. Calif. Statutes, 1851, Ch. 29, Section 161, p. 229. It was reenacted in 1872 in California, based partly on the N.Y. Code of Criminal Procedure, Section 263. Calif. Pen. C.A., Section 686, Legislative Historical Note. The New York enact-

ment was amended in 1888, giving the magistrate discretionary power and using the word "may" rather than "must" as was in the previous law. Laws of N.Y., 1888, Chap. 220, § 1.

We can presume that the State Legislators of California and the Territorial Legislators of Arizona understood the distinction between the mandatory word "shall" and the permissive word "may". Certainly our Arizona Supreme Court, in 1939, when they promulgated the present Rules of Criminal Procedure and kept the mandatory form in Rule 27, understood they were giving the defendant an absolute unqualified right. Since the Arizona Rules of Criminal Procedure have the same power and effect as statutes, basic rules of statutory construction require us, before declaring the rule invalid, to be satisfied that the rule is unconstitutional and every intendment must be indulged by the courts in favor of the validity of the rules. Brown v. Haymore, supra; State v. Davey, 27 Ariz. 254, 232 Pac. 884 (1925); Hernandez v. Frohmiller, 68 Ariz. 243, 204 Pac.2d 854 (1949); Shaw v. State, ... Ariz. App. ....., ... Pac.2d ..... (Filed November 20, 1968).

California still has the mandatory language in its criminal rules. It is considered by the California courts as more than a substantive right. It is a fundamental safeguard which provides indispensable protection to criminally accused defendants and does not require a showing of prejudice in order to be invoked. If we use the reasoning of the California Supreme Court, Rule 27 was promulgated in Arizona because the Arizona Supreme Court felt that this was the best method of ensuring to a defendant a fair opportunity to have probable cause determined without fear of public ridicule or passion. People v. Prizant, 186 Cal. App.2d 542, 9 Cal.Rptr. 282 (1960); People v. Duckett, 210

Cal.App.2d 867, 26 Cal.Rptr. 926 (1963); McGonagill v. Superior Ct., 214 Cal.App.2d 192, 29 Cal.Rptr. 485 (1963).

The grand jury has always been a secret, non-public affair, and so has the investigation by the magistrate under Criminal Rule 1 of the Arizona Rules of Criminal Procedure, commonly called a "one man grand jury". By their nature these proceedings are secret since only a complainant and prosecution witnesses need testify. It is not mandatory that the defendant be present or even be apprised that a hearing is being conducted. In the case of juvenile proceedings, privacy is also the rule, e.g., North Dakota Century Code 27-16-18; State v. Guerrero, 58 Ariz. 421, 120 Pac.2d 798 (1942). In the Arizona case it was pointed out that:

> "The policy of the juvenile law is to hide youthful errors from the full gaze of the public and bury them in a graveyard of the forgotten past. * * *" 58 Ariz. at page 430.

Many states require adoption proceedings to be done in private, e.g., California Civil Code, Sec. 226(M); Iowa Code Annotated 600.4 and Massachusetts General Laws Annotated 210, Sec. 6.

It should be kept in mind just what exactly is the purpose of a preliminary examination. It is a screening procedure which keeps the superior court from expending its time and energies, and the defendant from needless expense and degradation in defending groundless or unsupportable claims. Many times such an unjustifiable prosecution is stopped when a lack of probable cause is shown. Dodd v. Boies, 88 Ariz. 401, 357 Pac.2d 144 (1960); State v. Marlin, 5 Ariz.App. 524, 428 Pac.2d 699 (1967).

There are many dangers involved in publicizing the proceedings of a preliminary hearing. It cannot be doubted that

at times statements printed by the press may seriously and irreparably injure a defendant's reputation for life, not to mention the danger that may befall the complainants, victims and witnesses involved. Worthy of mention are the dangers of prejudicing prospective jurors who may be called to pass upon matters related to the crime under inquiry.

California, in construing their similar rule, points out the importance and necessity of such a protective device as was available in the old Rule 27:

> "* * * The testimony heard at the preliminary examination is often that of the prosecution only. The defense may remain silent if it appears that reasonable or probable cause to commit has been established. One of the main purposes of section 868 is to give the defendant the opportunity of protecting his right to an impartial and unbiased jury by preventing dissemination of this testimony, either by newspaper or other media prior to the trial. See Kirstowsky v. Superior Court, 143 Cal.App.2d 745, 300 P.2d 163. 'The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to a trial by jury guaranteed by the constitution.' Lombardi v. California Ry. Co., 124 Cal. 311, 317, 57 P. 66, 68. This right may be substantially impaired if the protection afforded by section 868 is denied." People v. Elliot, 54 Cal.2d 498, 6 Cal.Rptr. 753, 354 Pac.2d 225, 229 (1960).

The old Rule 27 of the Arizona Rules of Criminal Procedure as it was written at the time involved herein was, we believe, a constitutionally permissible balancing of the interests of the public with the rights of a defendant in a preliminary hearing. We therefore hold that the Arizona Supreme Court under the powers given it in the Arizona Constitution and by A.R.S. § 12-109 may constitutionally

promulgate a rule which will make it mandatory upon a magistrate at a preliminary hearing to exclude from the courtroom all persons except attorneys in the case and officers of the court, upon request of the defendant.

We refer to our former opinion wherein we held that the evidence was sufficient to support the judgment of guilt.

Affirmed.

FRANCIS J. DONOFRIO, Chief Judge

CONCURRING:

HENRY S. STEVENS, Judge

JAMES DUKE CAMERON, Judge

Appendix B

In the Court of Appeals
State of Arizona

Division One

1 CA-CR 162
(Maricopa County Superior Court No. 53083)

The State of Arizona,
Appellee,

vs

Walter W. Meek,
Appellant.

MOTION FOR REHEARING

Appellant, Walter W. Meek, respectfully moves the Court for an order granting a rehearing of its Opinion, Order and Judgment dated February 4, 1969 for the following reasons:

1. In addition to the issue of freedom of speech and freedom of the press, a very substantial constitutional question was presented under the argument "Questions Presented for Review" subparagraph (a) and (c), and each of them.

The Opinion as rendered wholly ignores these important and serious constitutional questions.

We respectfully direct the Court's attention to Appellant's Opening Brief, pages 37 through 55 for a discussion

of these constitutional questions wholly separate and apart from the question of speech and freedom of the press.

Appellant regards the violation of the freedoms guaranteed to him of liberty and due process of law as contended for in this portion of the brief as of equal importance, if not greater importance, than the notion of freedom of speech and freedom of the press.

The main underlying theme of the Court's Opinion in affirming the conviction of Mr. Meek apparently is that a reporter may be excluded from a public hearing because he is a reporter and because he proposed to report what goes on for the benefit of the public. The substance of the justification urged for this invasion of Mr. Meek's rights is that publication of matters brought out in such a hearing might be dangerous to the subject of the hearing.

If this be true, then it would be equally true that the press may be restrained from publishing anything learned by it because it might be "injurious to some person." We respectfully assert that to bar a reporter from a newsworthy event "because he is a reporter" constitutes and is in fact a prior restraint on freedom of the press.

Without unduly extending this argument further, through a rehash of the various contentions made in our briefs filed with the Court, we respectfully assert that what cannot be done directly may not be done by indirection, and if, in fact, the reporter is excluded from a hearing for the sole purpose of barring publication of matters going on at the hearing, then in fact freedom of the press has been violated.

However, we again urge the Court that due process of law requires that the main contentions which an appellant asserts should be reviewed and that the failure of the Court

to review the substantial questions presented does in fact deprive appellant of a fair review of the conviction in the Court below.

Respectfully submitted,

SNELL & WILMER
By /s/ MARK WILMER
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Copy mailed this 12th
day of February, 1969 to:
Gary K. Nelson, The Attorney General
Carl Waag, Assistant Attorney General
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Phoenix, Arizona
/s/ MARK WILMER

Appendix C

In the Court of Appeals
State of Arizona
Division One

February 26, 1969

1 CA-CR 162

Filed Feb 26, 1969
Classie Gantt, Clerk

The State of Arizona,
Appellee,

vs

Walter W. Meek,
Appellant.

Carl Waag
Mark Wilmer

The motion for rehearing and the response thereto have been considered by the Court.

It Is Ordered denying the motion for rehearing.

/s/ Francis J. Donofrio
Chief Judge

A true copy of the foregoing order was mailed this 26th day of February, 1969, to the attorneys named above.

Classie Gantt, Clerk
By /s/ Patsy A. Pierce
Deputy Clerk

Appendix D

In the Court of Appeals
State of Arizona
Division One
No. 1-CA-CR 162

The State of Arizona, *Appellee,*

vs

Walter W. Meek, *Appellant.*

PETITION FOR REVIEW

Comes Now the the appellant, Walter W. Meek, and petitions the Court for a review of this cause by the Supreme Court of the State of Arizona.

Dated this 27th day of February, 1969.

SNELL & WILMER
By Mark Wilmer
Attorneys for Appellant
400 Security Building
Phoenix, Arizona 85004

Copy mailed this 27th day of
February, 1969 to:
Gary K. Nelson, Attorney General
Attention: Carl Waag
Assistant Attorney General
State Capitol Building
Phoenix, Arizona
Attorney for Appellee

.....

MARK WILMER

Appendix E

Supreme Court
State of Arizona
Phoenix
April 7, 1969
No. 9581-PR (Supreme Court)
No. 1CA CR-162 (Court of Appeals)
No. 53083 (Maricopa County)

The State of Arizona,
Appellee,
vs
Walter W. Meek,
Appellant.

The following action was taken by the Supreme Court of the State of Arizona on April 1, 1969, in regard to the above-entitled cause:

"Ordered: Petition for Review—Denied.

Justice Fred C. Struckmeyer voted to grant."

SYLVIA HAWKINSON, Clerk
By /s/ LUCILE BROOKS
Deputy Clerk

To—Snell & Wilmer
400 Security Building
Phoenix, Arizona 85004

Gary K. Nelson, Attorney General
Capitol Building
Phoenix, Arizona (Attention: Carl Waag)

Court of Appeals
Division No 1
Capitol Building
Phoenix, Arizona

West Publishing Company
Attention: Mr. Nelson
St. Paul, Minn.



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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, [redacted] 1969

No. [redacted] 207

WALTER W. MEEK,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

GARY K. NELSON
The Attorney General
of the State of Arizona

CARL WAAG
Assistant Attorney General
159 Capitol Building
Phoenix, Arizona 85007

Attorneys for Respondent

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 1492 Misc.

WALTER W. MEEK,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

RESPONSE TO PETITION FOR
WRIT OF CERTIORARI

THE STATE OF ARIZONA, by its Attorney General, GARY K. NELSON, by his assistant CARL WAAG, pursuant to Rule 24, Rules of the Supreme Court, 28 U.S.C., responds to the Petition for Writ of Certiorari heretofore filed.

OPINION BELOW, JURISDICTION, QUESTIONS PRESENTED, CONSTITUTIONAL PROVISIONS AND STATEMENT OF THE CASE

Respondent accepts petitioner's presentation of the above matters in his petition.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

As to Questions 1 and 2:

Petitioner bases much of his argument on the proposition that the First Amendment guarantee of a free press implies the corollary that the press must not be hampered in gathering newsworthy matter. Petitioner's corollary would condemn the window-peeping statute with the same taint of unconstitutionality he seeks to attach to Rule 27, Arizona Rules of Criminal Procedure, 17 A.R.S.; it would destroy

every notion of the sanctity of a man's home and the privacy of his papers and conversations. The search for news would gain precedence over the individual's right to be let alone, as well as his right to a fair trial. The public has no right to know the private business of any individual.

The First Amendment prohibition against congressional interference with freedom of the press speaks, as do all the clauses of the Bill of Rights, in terms of restricting the power of the State in dealing with its subjects. The Bill of Rights is a charter of freedoms which are guaranteed to the citizens by specific curtailments of the powers of the sovereign.

Kovach v. Maddux, 238 F.Supp. 835 (1965) is not in point because it deals

with the usurpation of a right of privacy by a governmental body. The instant case deals with a rule granting to a citizen the right to invoke a right of privacy when the sovereign is inquiring into his putative misbehavior.

Arizona does not argue that the State has or should have, under any circumstances whatsoever, the power to close any proceeding, judicial or otherwise, from the scrutiny of the public or from the press. What is advocated is the accused's right to require that the State's inquiry into the question whether he should be held to answer the State's charge of wrongdoing be conducted in private so far as possible; and that an accused be protected from exhibition of his misfortune, for the titillation of the prurient interest of the reading public.

Whether such a right abates on a finding that there is probable cause to hold him is another question, not before this Court.

The accused in the preliminary hearing which the petitioner herein sought to attend was entitled to a fair trial. He was entitled to the attendance of witnesses. No trial attorney can deny that witnesses to some matters are easier to come by when a hearing is to be private than when it is to be conducted in public. If an accused's right to have witnesses in his behalf is to be balanced against the appellant's right to know the details of his alleged misdeeds, there can be no discussion as to which right must give way. If the proposition were open to discussion, that discussion would be best conducted in the legislative branch of our

government. If the rights of one group are to be sacrificed to the interests of another, it is best that those rights and interests be weighed where the widest possible discussion can be had and where the influence of the largest possible number of citizens can be brought to bear on the decision.

We deal here with a preliminary hearing, a statutory procedure tolerated as a substitute for the constitutionally required grand jury indictment. When this Court ruled in Hurtado v. California, 110 U.S. 516, 4 S.Ct. 111, 28 L.Ed. 232 (1884) that information and preliminary hearing would suffice as due process in the stead of the indictment of a grand jury, it did not rule on a procedure where the accused would be



deprived of the shelter of the grand jury's secrecy. The Court said:

> "* * *
> The Supreme Court of California, in the judgment now under review, followed its own previous decision in Kalloch v. Superior Ct., 56 Cal. 229, in which the question was deliberately adjudged. Its conclusion was there stated as follows:
>
> 'This proceeding, as (it) is regulated by the Constitution and laws of this State, is not opposed to any of the definitions given of the phrases 'due process of law' and 'the law of the land;' but, on the contrary, it is a proceeding strictly within such definitions; as much so in every respect as is a proceeding by indictment. It may be questioned whether the proceeding by indictment secures to the accused any superior rights and privileges; but certainly a prosecution by information takes from him no immunity of protection to which he is entitled under the law.'
> * * *" (p. 233)

In deciding Jones v. Robbins, 8 Gray

329 (Mass. 1857), quoted in Hurtado. Chief Justice Shaw writing for the Court stated:

> "The right of individual citizens to be secure from an open and public accusation of crime, and from the trouble, expense and anxiety of a public trial before a probable cause is established by the presentment and indictment of a grand jury, in case of high offenses, is justly regarded as one of the securities to the innocent against hasty, malicious and oppressive public prosecutions, and as one of the ancient immunities and privileges of English liberty." (Emphasis added) (p. 344)

Unless Hurtado is to be reversed so that the secrecy of the grand jury will again cloak all persons accused in state courts until such time as probable cause has been established, this Court must not deprive the accused of the option to choose a secret preliminary hearing.

The public has, as petitioner argues,

a legitimate interest in the conduct of preliminary hearings, as well as in trials, but that interest is as well protected by a rule permitting the accused who desires an open hearing to have it and preserving the right to exclude press and public to the accused who deems such exclusion desirable. It matters not whether he desires privacy in the interests of a fair hearing, or in order to protect his reputation in the face of baseless accusations.

Petitioner claims to be unable to see a distinction between his right to sit in the park and his right to sit in the courtroom during a preliminary hearing into a charge of a heinous crime. The distinction lies in the fact that one accused of heinous

crime has rights which are in conflict with those of petitioner. Either the accused must suffer the injury of adverse publicity which may so affect the community as to make an impartial jury difficult or impossible to select, the injury of being unable to persuade witnesses to come forward in his behalf, the injury of having his most secret and private misdeeds become public property, or the injury of having all the world informed of a baseless accusation against him; or the appellant must suffer the injury of being confined to reporting the conduct of some other matter in another courtroom where the accused desires the presence of the press at the public hearing to which he is entitled.

The State denies that the Court has the power petitioner would concede it to

close a hearing or trial other than on the request of the accused. The accused has a right to public trial which may not be abrogated for the Court's reasons. He also has a right to a private hearing, which is just as important to him and just as much a part of due process as the other right.

The instant case deals with conflicting rights of two citizens; one must give way to the other. Meek must leave the courtroom; or the accused must suffer what he deems an unfair preliminary hearing, he must have the fairness of his ultimate trial jeopardized by publicity, and he must suffer the embarrassment of public condemnation before it has been judicially decided that there is probable cause to arraign him.

The choice of which shall prevail



should not be in question, but if the rights of an accused are to be abrogated in favor of the appellant's right to enrichment by his misery, (petitioner's claim that he is deprived of property without due process) or the public's right to know what the accused has been up to before his formal arraignment, that abrogation should not be undertaken by this Court. It should be left to the Legislature.

As to Question 3:

The question whether petitioner was deprived of some right by due process only arises if he establishes that he has such a right in the first place. The decision of the Arizona Court of Appeals was that petitioner had no such right; therefore, no due process question was involved in the case.

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari herein should be denied.

Respectfully submitted,

GARY K. NELSON
The Attorney General

CARL WAAG
Assistant Attorney General

AFFIDAVIT

STATE OF ARIZONA)
) ss.
County of Maricopa)

CARL WAAG, being first duly sworn, upon oath, deposes and says:

That he is an Assistant Attorney General of the State of Arizona; that as such he served the attorney for the petitioner in the foregoing case by forwarding two (2) exact copies of response to petition for writ of certiorari in a sealed envelope, first class postage prepaid, and depositing same in the United States mail addressed to:

Mark Wilmer
Snell and Wilmer
400 Security Building
Phoenix, Arizona 85004
Attorneys for Petitioner

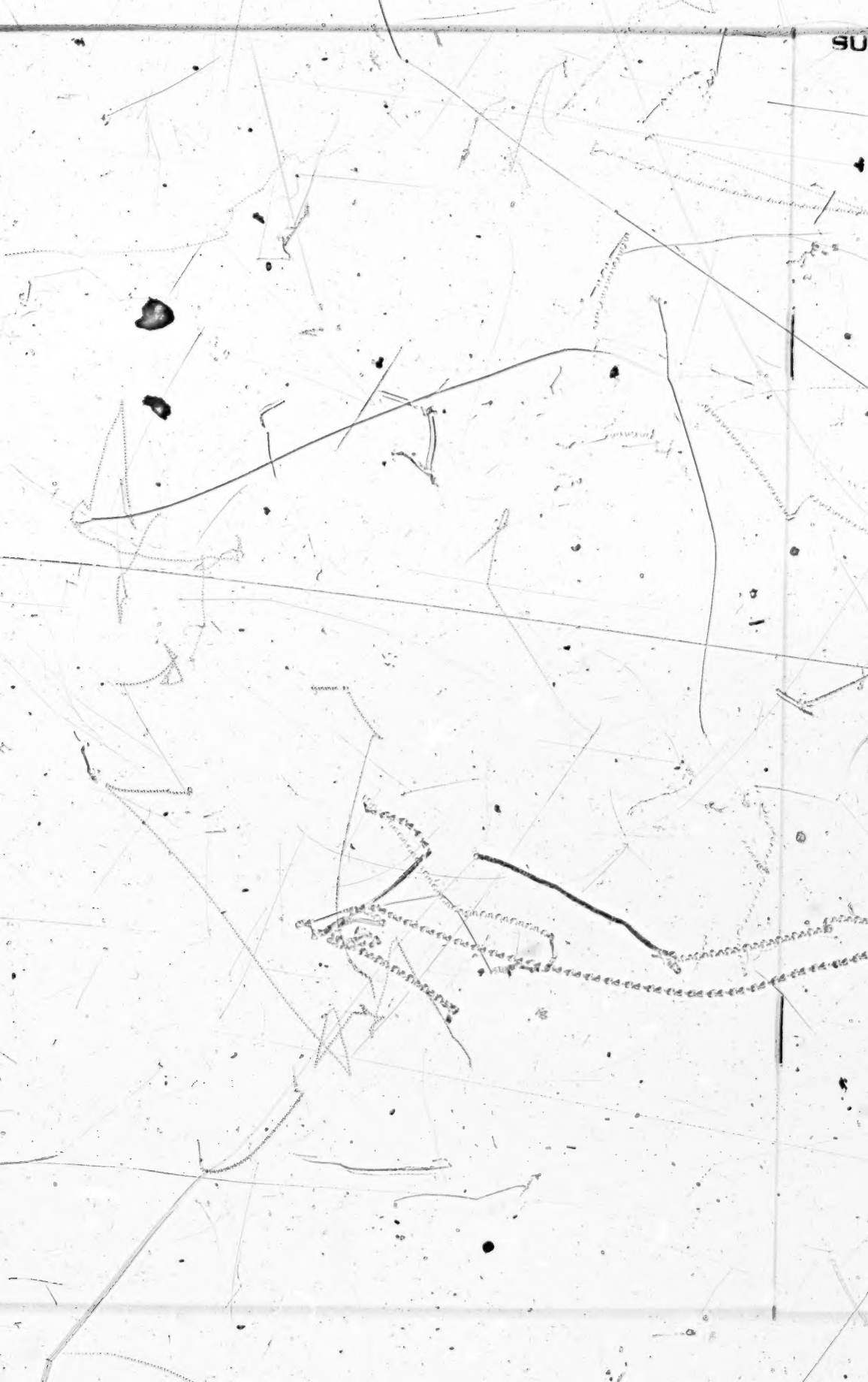
this _____ day of July, 1969.

_____

SUBSCRIBED AND SWORN to before me this _____ day of July, 1969.

_____
Notary Public

My commission
expires:



PREME COURT, U. S.

No. 207 [redacted]

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In the Supreme Court of the United States

.....: TERM, 19 69

WALTER M. MEEKS,
Petitioner,

vs.

STATE OF ARIZONA,
Respondent.

REPLY BRIEF

MARK WILMER
Security Building
Phoenix, Arizona 85004
Attorney for Petitioner
Walter W. Meek



TABLE OF AUTHORITIES CITED

Cases	*Pages*
Wales vs. Tax Commission, 100 Ariz., 181 412 P.2d 472	5
State vs. Superior Court, 95 Ariz. 319, 390 P.2d 109	5

STATUTES AND RULES OF COURT

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In the Supreme Court of the United States

..... TERM, 19.....

WALTER M. MEEKS,
Petitioner,

vs.

STATE OF ARIZONA,
Respondent.

REPLY BRIEF

The substance of the Responding Brief of the State of Arizona is that the same considerations which envelope grand jury proceedings with the cloak of secrecy apply to a preliminary hearing. The contention is that there should be no disclosure of a pending criminal accusation unless and until a criminal charge is in fact made against the defendant; otherwise unfounded accusations may damage a defendant's reputation and violate his right to a fair trial. A defendant should be entitled it is asserted, if he wishes, to avoid "having his most secret and private misdeeds become public property" (R.B.10).

Respondent does not recognize that very real and effective provisions of the Arizona Rules of Criminal Procedure block the "unfounded accusations" suggested by Respondent.

Rules 1 and 2 (Vol. 17 A.R.S. p.172) provides:

RULE 1. COMMENCEMENT OF ACTION BY COMPLAINT; DUTY OF MAGISTRATE

A. All criminal actions and proceedings brought before any magistrate for a public offense, triable within the county, shall be commenced by complaint, in writing, under oath, setting forth the offense charged, with such particulars of time, place, person and property as to enable the defendant to understand distinctly the character of the offense complained of.

B. When a complaint is made to a magistrate that an offense has been committed, he shall examine on oath the complainant and any witness the complainant produces and any witness subpoenaed by the magistrate. If the county attorney so requests, the magistrate shall subpoena witnesses for examination. The magistrate may take the affidavit of any such witness and cause the affidavit to be subscribed by the person making it.

RULE 2. ISSUANCE OF WARRANT OF ARREST

A warrant shall be issued, except as provided by subsections A and B in Rule 11, for the arrest of the person complained against if the magistrate from the examination of the complainant and the witnesses, if any, has reasonable ground to believe that an offense was committed and that the person against whom the complaint was made committed it.

Thus it is plain that a charge under oath must be made that a named defendant has committed a named criminal offense specifying "such particulars of time, place, persons and property as to enable the defendant to understand distinctly the character of the offense complained of."

Not only this but the Magistrate must examine the complainant under oath and any witnesses the magistrate

may subpoena to satisfy himself that a warrant of arrest should issue and it is only "if the magistrate from the examination of the complainant and the witnesses, if any, has reasonable grounds to believe that an offense has been committed and that the person against whom the complaint was made committed it" that a complaint is accepted for filing and a warrant of arrest issued.

Rules 16 and 17 provide:

RULE 16. DUTY OF MAGISTRATE

When the defendant is brought before the magistrate after arrest, either with or without a warrant, on a charge of having committed an offense which the magistrate is not empowered to try and determine, the magistrate shall immediately inform him:

1. Of the charge against him.

2. Of his right to the aid of counsel during the preliminary examination.

3. Of his right to waive such examination.

RULE 17. WAIVER OF EXAMINATION

A. The defendant may waive a preliminary examination. If he does, the magistrate shall hold him to answer and shall either admit him to bail or commit him to custody as provided by subsection A of Rule 33.

B. Notwithstanding a waiver of examination by the defendant, the magistrate, on his own motion may, or on the demand of the county attorney shall, examine the witnesses for the state and have their testimony reduced to writing or taken by a court reporter and transcribed.

C. After hearing the testimony, if it appears that there is not probable cause to believe the defendant guilty of an offense, the magistrate shall order that he be discharged.

There is no provision, under Arizona law for secrecy as to the fact a complaint under oath has been made against a defendant disclosing the name of the defendant and the particulars of the crime with which he is charged and that a warrant has issued for his arrest. Since no such charge will be accepted or warrant issued until the magistrate, from his inquiry, has reasonable grounds to believe the complaint meritorious, frivolous and baseless charges receive no publicity. Therefore, under Arizona law the inquiry becomes an investigation of a specific individual's conduct in which the public has a legitimate interest.

A grand jury, under Arizona law, is not empaneled to investigate individuals but criminal offenses. In *Wales vs. Tax Commission,* 100 Ariz., 181, 412 P.2nd 472, the Arizona Supreme Court said:

> "As stated, the response suggests that the Pima County Grand Jury is presently investigating certain named individuals. The function of a grand jury is to investigate criminal offenses, not the conduct of individuals. Rule 92, Rules of Criminal Procedure, 17 A.R.S. It is not permitted to speculate that some person might have committed an offense and, therefore, to investigate individuals to determine what, if any, offenses may possibly have been committed by them."

In *State vs. Superior Court* 95 Ariz. 319, 390 P.2d 109, the Arizona Supreme Court quoted with approval from *Pittsburg Plate Glass Co. vs. United States,* 360 U.S. 395, 79 S. Ct. 1237, 3 L.Ed.2d 1323 (1959) as follows in part:

> "Ever since this action by the Fathers, the American grand jury, like that of England, 'has convened as a body of laymen, free from technical rules, acting in secret, pledged to indict no one because of prejudice and to free no one because of special favor.' Ibid. Indeed, indictments may be returned on hearsay, or for that matter, even on the knowledge of the grand jurors

themselves. Id., 350 U.S. at pages 362, 363, 76 S.Ct. at pages 408, 409 [100 L.Ed. 397]. To make public any part of its proceedings would inevitably detract from its efficacy. Grand jurors would not act with that independence required of an accusatory and inquisitorial body. Moreover, not only would the participation of the jurors be curtailed, but testimony would be parsimonious if each witness knew that his testimony would soon be in the hands of the accused."

The grand jury as a cross section of the people of the county represents the conscience of the county. There is no room for political favoritism or financial gain from action or inaction. It is impanelled as an inquisatorial body to search out and investigate crime not in the first instance if a particular individual may or may not have committed a crime.

Once its deliberations are completed by return of an indictment the fact of the criminal charge laid against a defendant is public knowledge, subject only to the defendant being taken into custody. Witnesses before the grand jury may be freely interviewed after their testimony has been given and their version of the testimony which they gave before the grand jury freely publicized *State vs. Superior Court, supra,* (95 Ariz. at 331, 390 P.2d at 117, 118).

After the magistrate has established there is probable cause to believe a criminal offense has been committed, and that a given person has committed it the public then has a real stake in making sure its prosecuting officials act competently and fairly and that its magistrates act justly and fairly. It is just as important also for the public to know whether oppression is being practiced by its officials as it is to know that justice is dispensed without fear or favor.

Closed doors breed suspicion and distrust. When it

is known that a citizen, prominent or otherwise, has been accused under oath of the Commission of a criminal offense and that a public official charged by law with the responsibility of making inquiry as to the probable validity of such charge has found probable cause to believe a crime has been committed and that the defendant committed it the public is then entitled to know and observe how its officials function.

It has long been the function of reporters to become the eyes and ears of the public to the end that it become and remain informed. To the extent that reporters are excluded from access to newsworthy proceedings in which the public has a legitimate interest for the purpose of preventing publication of words spoken and action taken to that extent we have de facto censorship. Certainly this is as much an invasion of constitutional guarantees as similar action by direct order of a judge or physical use of the censors shears.

Respectfully submitted,

SNELL & WILMER

By .....

MARK WILMER
Attorneys for Petitioner
400 Security Building
Phoenix, Arizona 85004

AFFIDAVIT

STATE OF ARIZONA)
: ss.
County of Maricopa)

MARK WILMER, being first duly sworn, upon oath, deposes and says:

That he is the attorney for the Petitioner; that as such he served the attorney for Respondent in the foregoing case by forwarding two (2) exact copies of the Reply Brief in a sealed envelope, first class postage prepaid, and depositing same in the United States mail addressed to:

Gary K. Nelson, The Attorney General
Carl Waag, Assistant Attorney General
Attorneys for Petitioner
State Capitol Building
Phoenix, Arizona

this ..... day of August, 1969.

MARK WILMER

Subscribed and sworn to before me this ..... day of August, 1969

My Commission Expires:

Notary Public